Soh Chun Seng v CTOS-emr Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2-23-35 OF 1997
RAMLY ALI J
12 JUNE 2003

***Tort** — Defamation — Libel — Publication of information regarding creditor's petition presented against plaintiff — Whether defendant under duty to publish most up-to-date account as to status of bankruptcy proceedings brought against plaintiff — Whether damages for omission to publish words in domain of tort of libel*

***Tort** — Defamation — Libel — Publication of information regarding creditor's petition presented against plaintiff — Whether words complained of defamatory — Whether ordinary reasonable and fair-minded person would discern meanings as alleged by plaintiff — Whether words complained of true in substance and in fact*

This was the plaintiff's claim for damages for defamation arising from a libellous statement which had allegedly been published against him by the defendant. The plaintiff stated that by a report dated 29 April 1997 ('the said report'), the defendant had published statements to Audio One Entertainment Sdn Bhd ('AOE') which by its natural and ordinary meaning and/or innuendo were false and libellous in nature. The said report stated, inter alia, that a creditor's petition dated 30 October 1992 had been issued against the plaintiff by American Express (M) Sdn Bhd. A notation 'Star 010493' appeared in the said report, thus indicating that the information was sourced from the 1 April 1993 issue of *The Star* newspaper. The following remark also appeared at the top of the said report: 'Important: This report is confidential. Reproduction is prohibited. The report only indicates the information was published in the relevant source. It is not intended as confirmation of the 'current status' of the case. For the case's current status, your further probe with the relevant parties is required' ('the header'). The plaintiff contended that the said report had caused injury to the plaintiff's reputation as it inferred to anyone who had read the same that the plaintiff was an undischarged bankrupt; had been adjudicated a bankrupt; was an insincere and untrustworthy person; was not fit to be a businessman and/or was not an honest and financially sound director; and the companies under the management of the plaintiff qua director were neither stable nor sound. The defendant admitted it had furnished to AOE the said report based on the information collated and compiled in its database relating to the plaintiff, which was obtained from *The Star* newspaper dated 1 April 1993. The defendant stated that the information furnished to AOE in respect of the plaintiff was correct in every respect, to wit, that a creditor's petition dated 30 October 1992 was presented against the plaintiff at the instance of American Express (M) Sdn Bhd and a notice of the same was advertised in *The Star* newspaper by way of substituted service. The defendant denied that the information furnished was false or defamatory and was capable of

bearing the meanings as pleaded by the plaintiff. The defendant's defence was premised on the grounds that the words were not defamatory and the words were true in substance and in fact.

Held, dismissing the plaintiff's claim:

(1) The plaintiff must first discharge the onus of proving that the words complained of were defamatory of the plaintiff. Only upon the plaintiff establishing this would the burden then rest on the defendant to prove that those words were in substance and in fact true (see p 189A); *Progressive Insurance Sdn Bhd v RM Insurance Underwriting Agency Sdn Bhd & Ors* [2003] 5 CLJ 321 and *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 followed.

(2) In considering whether the words complained of were defamatory or capable of bearing the meanings as alleged by the plaintiff, the court must construe the said report in its entirety and ask if an ordinary, reasonable and fair-minded person who had read the whole of the said report would discern the meaning as alleged by the plaintiff (see p 191B–C); *Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors* [1999] 3 MLJ 529; *Noor Asiah bte Mahmood & Anor v Randhir Singh & Ors* [2000] 2 MLJ 175 and *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283 followed.

(3) In the instant case, the court must scrutinize the matters stated in the said report relating to the plaintiff and in the light of the header which preceded the information, consider whether an ordinary, reasonable and fair-minded person who had read the whole of the said report would discern the meanings as alleged by the plaintiff. Here, the header had made it plain to any reasonable reader that the information appearing below it was not intended as confirmation of the current status of the creditor's petition and that if the reader wished to know the current status, a check with the parties concerned was necessary. The header also made it plain that it only served to confirm that the information appearing below it had been obtained from a source, namely, *The Star* newspaper. Therefore, by the contents of the header, the defendant had in fact asserted that the information appearing below the header was not intended to mean any of the imputations that the plaintiff had alleged. As such, when the header was so read, it was impossible that any reasonable man should collect from it the libellous imputation alleged (see pp 191H–192A, F–G); *Stubbs, Ld v Russel* [1913] AC 386 followed.

(4) Accordingly, the court was satisfied that the plaintiff had failed to establish that the contents of the said report, which was the subject matter of the present action, were defamatory and on this ground alone, the plaintiff's claim against the defendant can be dismissed with costs (see p 194C–D).

(5) The court could not agree with the plaintiff's propositions that the defendant was under a duty, imposed in the law of libel, to publish the most up-to-date account as to the status of the bankruptcy proceedings brought against the plaintiff or make every effort to ascertain the most up-to-date account as to the status of the bankruptcy proceedings before it published the matters contained in the said report. The law of libel afforded a remedy where a person was libelled by the publication of defamatory words. Damages for the omission to publish words were not the domain of the tort of libel. It may well be that where such omission had occasioned loss to a party, that party may have his remedy in the tort of negligence, but as the law of libel catered for situation where words were published, a complaint of omission to publish, fundamentally, cannot found an action in libel. The law of defamation imposed a singular, paramount duty on the publisher — to speak to truth. The ingredients of the tort of negligence should not be allowed to be used to make true but defamatory statement actionable (see pp 194H–195D, 196C).

(6) Even assuming the plaintiff had successfully established that the words were defamatory, the defendant by its own evidence as well as evidence of the plaintiff himself had clearly shown that those words were in substance and fact, true. As a matter of law, truth or justification was an absolute defence to an action in libel or slander. If the statement was true, no amount of malice or bad faith or belief in the falsity of the statement will make it actionable. If people think the worst of the plaintiff when they hear the truth about him, then his reputation had been reduced to the proper level (see pp 196F, 197E–F).

[Bahasa Malaysia summary

Ini adalah tuntutan ganti rugi plaintif kerana fitnah yang timbul dari kenyataan libel yang dikatakan telah diterbitkan terhadap beliau oleh defendan. Plaintif menyatakan bahawa melalui satu laporan bertarikh 29 April 1997 ('laporan tersebut'), defendan telah menerbitkan kenyataan-kenyataan kepada Audio One Entertainment Sdn Bhd ('AOE') yang mana melalui maksud semulajadi dan biasa dan/atau sindiran adalah palsu dan bersifat libel. Laporan tersebut menyatakan, antara lain bahawa satu petisyen pemiutang bertarikh 30 Oktober 1992 telah dikeluarkan terhadap plaintif oleh American Express (M) Sdn Bhd. Satu notasi 'Star 010493' tertera dalam laporan tersebut, yang menandakan bahawa maklumat tersebut diperolehi dari akhbar *The Star* keluaran 1 April 1993. Kata-kata tersebut juga tertera pada bahagian atas laporan tersebut: 'Important: This report is confidential. Reproduction is prohibited. The report only indicates the information was published in the relevant source. It is not intended as confirmation of the 'current status' of the case. For the case's current status, your further probe with the relevant parties is

A required' ('kepala tajuk tersebut'). Plaintif menegaskan bahawa laporan tersebut telah menjejaskan reputasi plaintif kerana ia membuat inferens kepada sesiapa yang membacanya bahawa plaintif adalah seorang yang bankrap dengan hutang yang tidak berbayar; seorang yang tidak ikhlas dan tidak boleh dipercayai; tidak layak menjadi peniaga dan/atau bukan seorang pengarah yang jujur dan
B mempunyai kedudukan kewangan yang kukuh dan syarikat-syarikat di bawah pengurusan plaintif sebagai pengarah tidak stabil mahupun kukuh. Defendan telah mengaku bahawa ia telah mengemukakan kepada AOE laporan tersebut berdasarkan maklumat yang dikumpul dan disusun dalam pangkalan datanya berkaitan plaintif, yang telah
C diperolehi dari akhbar *The Star* bertarikh 1 April 1993. Defendan menyatakan bahawa maklumat yang dikemukakan kepada AOE berkaitan plaintif adalah betul dalam semua aspek, bahawa satu petisyen pemiutang bertarikh 30 Oktober 1992 telah dikemukakan terhadap plaintif atas permintaan American Express (M) Sdn Bhd dan satu notis yang sama telah diiklankan dalam akhbar *The Star* melalui
D penyampaian gantian. Defendan menafikan bahawa maklumat yang dikemukakan adalah palsu atau berunsur fitnah dan mampu untuk membawa maksud sebagaimana yang diplidkan oleh plaintif. Pembelaan defendan berasaskan alasan-alasan bahawa perkataan-perkataan tersebut tidak berunsur fitnah dan perkataan-perkataan tersebut adalah benar pada amnya dan secara fakta.

E

Diputuskan, menolak tuntutan plaintif:

(1) Plaintif perlu melepaskan beban membuktikan perkataan-
F perkataan yang diadukan sebagai berunsur fitnah terhadap plaintif. Hanya setelah plaintif dapat membuktikan ini maka beban tersebut terletak ke atas defendan untuk membuktikan bahawa perkataan-perkataan adalah pada amnya dan secara fakta benar (lihat ms 189A); *Progressive Insurance Sdn Bhd v RM Insurance Underwriting Agency Sdn Bhd & Ors* [2003] 5 CLJ 321
G dan *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 diikut.

(2) Dalam mempertimbangkan sama ada perkataan-perkataan yang diadukan berunsur fitnah atau mampu untuk membawa maksud sebagaimana yang dikatakan oleh plaintif, mahkamah hendaklah
H menafsirkan laporan tersebut secara keseluruhan dan jika bertanyakan kepada seorang yang biasa, munasabah dan berfikiran waras yang telah membaca keseluruhan laporan tersebut akan menanggap maksud sebagaimana yang dikatakan oleh plaintif (lihat ms 191B–C); *Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors* [1999] 3 MLJ 529; *Noor Asiah bte Mahmood*
I *& Anor v Randhir Singh & Ors* [2000] 2 MLJ 175 dan *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283 diikut.

(3) Dalam kes semasa, mahkamah hendaklah meneliti perkara-perkara yang dinyatakan dalam laporan tersebut berkaitan plaintif dan berdasarkan kepala tajuk tersebut sebelum maklumat tersebut, menimbangkan sama ada seorang yang biasa, munasabah dan berfikiran waras yang telah membaca keseluruhan laporan tersebut akan menanggap maksud-maksud sebagaimana yang dikatakan oleh plaintif. Di sini, kepala tajuk tersebut dengan jelas menunjukkan kepada mana-mana pembaca yang munasabah bahawa maklumat yang tertera di bawahnya tidak dimaksudkan sebagai pengesahan kedudukan semasa petisyen pemiutang tersebut dan dan jika pembaca ingin mengetahui kedudukan semasa, perlulah memeriksa dengan pihak-pihak berkaitan. Kepala tajuk tersebut juga dengan jelas menunjukkan bahawa ia hanya bermaksud untuk mengesahkan maklumat yang tertera di bahagian bawah telah diperolehi dari satu sumber, iaitu akhbar *The Star*. Oleh demikian, berdasarkan kandungan kepala tajuk tersebut, defendan pada hakikatnya menegaskan bahawa maklumat yang tertera di bahagian bawah kepala tajuk tersebut tidak berniat untuk membawa maksud apa-apa tuduhan sebagaimana yang diaktakan oleh plaintif. Dengan itu, apabila kepala tajuk tersebut dibaca, tidak mungkin seorang yang munasabah akan menganggapnya sebagai tuduhan berunsur libel sepertimana dikatakan (lihat ms 191H–192A, F–G); *Stubbs, Ld v Russel* [1913] AC 386 diikut.

(4) Sewajarnya, mahkamah berpuas hati yang plaintif telah gagal untuk membuktikan bahawa kandungan-kandungan laporan tersebut, yang merupakan perkara pokok tindakan semasa, berunsur fitnah dan atas alasan ini sahaja, tuntutan plaintif terhadap defendan boleh ditolak dengan kos (lihat ms 194C–D).

(5) Mahkamah tidak bersetuju dengan cadangan plaintif bahawa defendan di bawah satu kewajipan, yang dikenakan di bawah undang-undang libel, untuk menerbitkan berita terkini berkaitan kedudukan prosiding kebankrapan yang dimulakan terhadap plaintif atau membuat apa-apa usaha yang patut untuk memastikan berita terkini berkaitan kedudukan prosiding kebankrapan sebelum ia menerbitkan perkara-perkara yang terkandung dalam laporan tersebut. Undang-undang libel memberikan satu remedi di mana seseorang yang difitnah secara libel melalui penerbitan perkataan-perkataan berunsur fitnah. Ganti rugi untuk peninggalan menerbit perkataan-perkataan bukan domain tort untuk libel. Ia boleh dikatakan di mana peninggalan sedemikian mengakibatkan kerugian kepada satu pihak, pihak tersebut boleh mendapat remedinya dalam tort untuk kecuaian, tetapi memandangkan undang-undang libel hanya membincangkan keadaan-keadaan di mana perkataan-perkataan yang diterbitkan, satu aduan terhadap peninggalan untuk menerbitkan, pada dasarnya, tidak boleh dimulakan dengan satu tindakan untuk libel. Undang-undang fitnah

A mengenakan satu kewajipan yang penting ke atas penerbit — untuk bercakap benar. Unsur-unsur dalam tort kecuaian tidak sepatutnya dibenarkan untuk digunakan bagi membuat kenyataan yang benar tetapi berunsur fitnah (lihat ms 194H–195D, 196C).

(6) Walaupun dengan andaian plaintiff telah berjaya membuktikan perkataan-perkataan tersebut berunsur fitnah, defendan melalui keterangannya dan juga keterangan plaintif sendiri menunjukkan bahawa perkataan-perkataan tersebut pada amnya dan secara fakta adalah benar. Berdasarkan undang-undang, kebenaran atau justifikasi adalah pembelaan yang mutlak terhadap satu tindakan untuk libel atau slander. Jika kenyataan adalah benar, tiada niat jahat atau kepercayaan terhadap kepalsuan kenyataan tersebut membolehkan satu tindakan dibuat. Jika orang memikirkan perkara buruk berkenaan plaintif apabila mendengar kebenaran tentang beliau, maka reputasi beliau telah diturunkan ke tahap yang betul (lihat ms 196F, 197E–F).]

Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 314–434.

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1966] 2 MLJ 66 (refd)
Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315 (folld)
Balfour v Attorney-General [1991] 1 NZLR 519 (refd)
Bell-Booth Group Ltd v Attorney General [1989] 3 NZLR 148 (refd)
Dato' Musa Hitam v SH Alattas & Ors [1991] 1 CLJ 315 (refd)
Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad [1999] 4 MLJ 58 (refd)
Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor [1978] 1 MLJ 75 (refd)
Kapt (B) Hj Mohd Ismail v Perwira Affin Bank Bhd (No 2) [2001] 5 CLJ 184 (refd)
Kian Lup Construction v Hongkong Bank Malaysia Bhd [2002] 7 MLJ 283 (folld)
Le Mercier's Fine Furnishing Pte Ltd & Anor v Italcomm (M) Sdn Bhd [1996] 3 CLJ 590 (refd)
Noor Asiah bte Mahmood & Anor v Randhir Singh & Ors [2000] 2 MLJ 175 (folld)
Pong Fee Voon v Piong Kien Siong & Ors [1999] 8 CLJ 383 (refd)
Progressive Insurance Sdn Bhd v RM Insurance Underwriting Agency Sdn Bhd & Ors [2003] 5 CLJ 321 (folld)
Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors [1999] 3 MLJ 529 (folld)
S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173 (refd)
Stubbs, Ld v Russel [1913] AC 386 (folld)

Uniphone Sdn Bhd v Chin Boon Lit & Anor [1998] 6 MLJ 441 (refd) A
Zolkefly bin Haron v Yahya bin Chik & Anor [2001] 62 MLJ 1 (refd)

Legislation referred to

Civil Law Act 1956 s 3
Defamation Act 1957 B

Philip Chai (*CW Kok* with him) (*Soo Thien Ming & Nashrah*) for the plaintiff.
Haris Mohd Ibrahim (*Nor Isman Ismail* with him) (*Liza Chan & Co*) for the defendant. C

Ramly Ali J: By his statement of claim, the plaintiff is claiming for damages for defamation arising from a libellous statement which has been published against him by the defendant. In particular, the plaintiff states that by a report dated 29 April 1997, the defendant published statements to Audio One Entertainment Sdn Bhd ('AOE') which by its natural and ordinary D meaning and/or innuendo are false and libellous in nature thereby causing injury to the plaintiff's reputation.

The defendant's defence is premised on the grounds that the words are not defamatory and the words are true in substance and in fact.

Facts of the case E

The plaintiff is, at all material times, a businessman and director of several companies known as the Audio One Groups of Companies. The plaintiff alleged that by a credit check report dated 29 April 1997 undertaken by the defendant at the request of a customer of the defendant, the defendant had reported, printed and published or caused to be reported, printed and F published defamatory words of and concerning the plaintiff. The report states, inter alia, as follows:

> CREDIT SEARCH REPORT DATED 29-04-97 Done by: SABILA
>
> IMPORTANT: This report is confidential. Reproduction is prohibited. The report only indicates the information was published in the relevant source. It G is NOT intended as confirmation of the 'current status' of the case. For the case's current status, your further probe with the relevant parties is required ...
>
> INFORMATION AS PER CTOS DATABASE ARE AS FOLLOWS:
>
> BANKRUPTCY — CREDITOR'S PETITION ISSUED
>
> SPECIAL REMARK: H
>
> NAME: SOH CHUN SENG
> I/C NO: 4695233/541023106353
>
> REMARK:
>
> EX PARTE: AMERICAN EXPRESS – JLN SULTAN ISMAIL, KL.
>
> BANKRUPTCY NO: D5-29-5830-92 I
>
> NOTICE DATE:
>
> HIGH COURT KUALA LUMPUR

PETITION DATE: 301092 STAR 010493
HEARING DATE: 040593
ORDER DA TE:
ANNUALMNT/DISC:
AMOUNT:
SOLICITOR: ISHARIDAH HO CHONG & MENON
LOT 903, 9th FLOOR
WISMA HLA
JALAN RAJA CHULAN
50200 KUALA LUMPUR
REF:IHCM/A3/92/NA/NA
TEL:03-2420022/2447975

The plaintiff contends that the report published by the defendant has caused injury to the plaintiff's reputation as it infers to anyone who has read the report that:

(a) the plaintiff is an undischarged bankrupt;

(b) the plaintiff has been adjudicated a bankrupt;

(c) the plaintiff is an insincere person and is untrustworthy;

(d) the plaintiff is not fit to be a businessman and/or is not an honest and financially sound director; and

(e) by reason of the matters state in (a), (b), (c) and (d) above, the companies under the management of the plaintiff qua director are neither stable nor sound.

The plaintiff pleads that the said credit check report does not reflect the true situation in which the Kuala Lumpur High Court had, on 23 September 1992, in the Bankruptcy Case No D5–29–5830–92 ordered that the creditor's petition dated 30 October 1992 presented against the plaintiff (which was the subject matter of the contents of the said report) be struck off.

By way of support for his claim to be entitled to exemplary or aggravated damages, the plaintiff complained that his application to Citibank for a credit card in or about December 1993 was rejected on account of the publication by the defendant of the credit check report. Further, the plaintiff also complains that an application by AOE for an industrial line-purchase facility of RM3m to Hong Leong Finance Bhd. on or before December 1996, was not considered an account of the same publication by the defendant. The plaintiff further pleads that by a letter dated 14 May 1997, the solicitors for the plaintiff had written to the defendant requesting that the information relating to the plaintiff in the credit check report be deleted, the defendant apologize and pay damages but the defendant failed, neglected and refused to do so.

The defendant, on the other hand, was incorporated on 13 October 1994 as Crisis Management Sdn Bhd and commenced its operation on 1 April 1995. The defendant then changed its name to CTOS-emr Sdn Bhd on 15 February 1996. The defendant is in the business of providing

information collated and compiled in its database from public records such as government gazettes; newspapers and data from searches conducted at the Registry of Business and the Companies Commission of Malaysia for its clients quick and easy reference and access for a fee. The defendant admitted that at the request of AOE, the defendant had, on 29 April 1997, furnished to AOE the said credit check report based on the information collated and compiled in its database relating to. the plaintiff, which was obtained from *The Star* newspaper dated 1 April 1993. The defendant states that the information furnished to AOE in respect of the plaintiff was correct in every respect, to wit, that a creditor's petition dated 30 October 1992 was presented against the plaintiff at the instance of American Express (M) Sdn Bhd vide Kuala Lumpur High Court Bankruptcy No D5–29–5830–92, and a notice of the same was advertised in *The Star* newspaper by way of substituted service. The defendant denies that the information furnished was false or defamatory and was capable of bearing the meanings as pleaded by the plaintiff. The defendant admits receiving the letter dated 14 May 1997 from the plaintiff's solicitors and states that the same was replied by a letter dated 19 May 1997 wherein the plaintiff's solicitors were requested to furnish evidence that the creditor's petition in the Bankruptcy Case No D5–29–5830–92 was struck off on 23 September 1993. This, the plaintiff or his solicitors has failed to do. The defendant states that prior to 19 May 1997 the defendant had no knowledge that the said creditor's petition has been struck off. Premised on the pleadings, the defendant raised three specific defences to the plaintiff's claim, namely:

(a) the words complained of do not bear the defamatory imputations as contended by the plaintiff;

(b) the words complained of are in substance and in fact true; and

(c) the words complained of were published on an occasion of 'qualified privilege'.

However, given the evidence that has emerged in the course of the trial in this action, the defendant chosed not to pursue the third defence on 'qualified privilege'.

The relevant law

In my earlier decision in *Progressive Insurance Sdn Bhd v RM Insurance Underwriting Agency Sdn Bhd & Ors* [2003] 5 CLJ 321, I have referred to the pronouncement of Mohamed Dzaiddin J (as he then was) in the case of *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 as having clearly laid down the necessary burden in establishing a claim for libel. In that case, his Lordship Mohamed Dzaiddin J had stated the law to be as follows (at p 316):

> In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show:
>
> (i) the words are defamatory,
>
> (ii) the words refer to the plaintiff; and
>
> (iii) the words were published.

The plaintiff must first discharge the onus of proving that the words complained of were defamatory of the plaintiff. Only upon the plaintiff establishing this does the burden then rest on the defendant to prove that those words are in substance and in fact true (see Supreme Court decisions in *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173; and *Abdul Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66).

Whether the words published are defamatory

The relevant information or words complained of by the plaintiff are found in the credit check report dated 29 April 1997 which has been marked as exh 'P2'. A perusal of exh P2 readily discloses that this document contains a heading which reads as follows:

> IMPORTANT: This report is confidential. Reproduction is prohibited. Report only indicates the information was published in the relevant source. It is not intended as confirmation of the current status of the case. For the case's current status, your further probe with the relevant parties is required.

A comparison between the particulars in para 5 of the statement of claim, wherein the plaintiff details the words complained of with the contents of the whole of exh P2 (in its entirely) reveals that the plaintiff has omitted the entire heading at the top of exh P2 in the particulars in para 5 of the statement of claim. In construing the meanings of the words complained of as pleaded by the plaintiff, the court must do so in the context of the entirety of the contents of exh P2.

In *Gatley on Libel and Slander* (9th Ed) at p 96 the learned author states:

> It is necessary to take into consideration, not only the actual words used, but the context of the words.

At p 97, the learned author continues:

> It follows from the fact that the context and circumstances of the publication must be taken into account and that the plaintiff cannot pick and choose parts of the publication which, standing alone, would be defamatory. This or that sentence may be considered defamatory, but there may be other passages which take away the sting.

Our courts have also pronounced the same principle to be the law applicable in Malaysia. In *Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors* [1999] 3 MLJ 529, Kamalanathan Ratnam J at p 535 stated that:

> I agree that the test to be applied when considering whether a statement is defamatory of a plaintiff is an objective one in that it must be given a meaning in which a reasonable man would understand it (See: *Gatley on Libel & Slander* (9th Ed) para 3.12) and that for this purpose, that is, in considering whether the words complained of contained any defamatory imputation, it is necessary to consider the whole article.

In another case, *Noor Asiah bte Mahmood & Anor v Randhir Singh & Ors* [2000] 2 MLJ 175, the High Court has also stated at p 190:

> I must hasten to add that the same authority reflected the view that a claim for libel whilst not to be founded on a headline or photograph in isolation from the related text, the question whether the article was defamatory had to be answered by reference to the response of the ordinary reasonable reader to the *entire publication.* (Emphasis added.)

In construing the words complained of to determine if they are capable of bearing defamatory meanings or not, the court must also endeavour to read those words through the eyes of the 'hypothetical reasonable person'. In *Gatley on Libel & Slander* (9th Ed) at p 80, the learned author opines as follows:

> If words conveyed a defamatory imputation to those to whom they were published, but would not have done so to the hypothetical reasonable person in that position, they are not defamatory. The essence of libel is the publication of written words to a person or persons by whom they would be reasonably understood to be defamatory of the plaintiff' so that the mere fact that the hearers understood the language in a defamatory sense does not make it defamatory unless they were reasonably justified in so understanding it. In the case of words defamatory in their ordinary sense it is not permissible to call evidence to prove that anyone did understand the words in a defamatory sense, but the question is simply whether reasonable people would have so understood them.

At p 81, the learned author of Gatley postulates the following question as an appropriate one to asked in trying to get the natural and ordinary meaning of the words complained of. The question is:

> What would the words convey to the mind of the ordinary, reasonable, fair-minded reader?

In my earlier decision in *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283, I had adopted the same approach proposed by the learned author of Gatley as stated above. At p 42 of *Kian Lup Construction*, I have stated the followings:

> In determining the issue, this court does not look to the actual effect of the allegation on the person's reputation, or the meaning of the words actually understood or taken by the listeners (see *JB Jeyaretnam v Goh Chok Tong* [1985] 1 MLJ 334.) It is not enough that the listeners actually take the words in a defamatory sense, for they must be reasonably justified in so understanding the words before they are found to be defamatory (see *The Straits Times Press (1975) Ltd v The Workers'Party & Anor* [1987] 1 MLJ 186).

The court is also of the view that in construing what the words complained of might reasonably mean, such meanings that can only be arrived at by a strained or utterly unreasonable interpretation are to be rejected. I find support for this view in the decision of Suriyadi Halim Omar J in *Pong Fee Voon v Piong Kien Siong & Ors* [1999] 8 CLJ 383. In that case it was held:

> How to arrive at their natural and ordinary meaning again is no easy matter, but necessitates the presiding judge to scrutinize the words. There should not be any unnecessary intellectual exercise to arrive at the meanings of those words. In other words, the whole process should be effortless. For this

purpose courts must reject meanings which can only emerge as a product of some strained or forced or utterly unreasonable interpretation.

Similarly, in *Le Mercier's Fine Furnishing Pte Ltd & Anor v Italcomm (M) Sdn Bhd* [1996] 3 CLJ 590, James Foong J, at p 593, stated:

> It is also necessary in considering this issue on the meaning, the court must not put a strained or unlikely construction upon the words ... .

Based on all the above authorities, I am of the view that in considering whether the words complained of are defamatory or capable of bearing the meanings as alleged by the plaintiff, the court must construe the entirely of exh P2 and ask if an ordinary, reasonable and fair-minded person who reads the whole of exh P2 would discern the meaning as alleged by the plaintiff.

By para 6 of the the statement of claim, the plaintiff pleads five meanings which he alleged the words complained of bear on him. These are:

(i) that the plaintiff is an undischarged bankrupt;

(ii) that the plaintiff has been adjudicated a bankrupt;

(iii) that the plaintiff is an insincere person and is untrustworthy;

(iv) that the plaintiff is not fit to be a businessman and/or is not an honest and financially sound director; and

(v) by reason of the matters stated in (i), (ii), (iii) and (iv) above, the companies under the management of the plaintiff qua director are neither stable nor sound.

Exhibit P2, on the other hand, contains the following informations:

(i) a creditor's petition was presented in the Kuala Lumpur High Court vide Bankruptcy No D5–29–5830–1992;

(ii) the creditor's petition was presented on 30 October 1992;

(iii) the plaintiff was named as respondent therein;

(iv) the plaintiff's old NRIC number is stated as being 4695233 whilst his new NRIC number is stated as being 541023106353;

(v) the plaintiff's address is stated as being No 7, Jalan 109, Kepong Baru, Kuala Lumpur;

(vi) the creditor's petition was presented by American Express (Malaysia) Sdn Bhd;

(vii) the creditor's petition was fixed to be heard on 4 May, 1993;

(viii) the solicitors acting for the petitioner were Messrs Isharidah, Ho, Chong & Menon; and

(ix) a notation 'STAR 010493'. thus indicating that the source of information as being *The Star* issue of 1 April 1993.

and all those information was proceeded by the header.

The court must scrutinize the matters stated in exh P2 relating to the plaintiff and the creditor's petition and, in the light of the header which preceeded the information, consider whether an ordinary, reasonable and fair-minded person who reads the whole of exh P2 would discern the meanings as alleged by the plaintiff.

The header makes it plain to any reasonable reader that the information that appears below it, is not intended as confirmation of the current status of the creditor's petition and that if the reader wishes to know the current status, a check with the parties concerned is necessary. The header makes it plain that it only serves to confirm that the information appearing below it had been obtained from a source, ie *The Star* newspaper.

No reasonable reader of exh P2, having noted the contents of the header, could conceivably reach the conclusion as suggested by the plaintiff that the information appearing below it meant that the plaintiff was an undischarged bankrupt, or had been adjudicated a bankrupt, or was insincere and untrustworthy was not fit to be a businessman, not honest or not financially sound. Certainly, no reasonable reader could conclude that the information appearing below the header might touch on the reputation of companies under the management of the plaintiff, save and except by an unreasonable stretch of imagination.

If the meanings suggested by the plaintiff are the result of a fanciful imagination of the reader rather than a reasonable, natural and ordinary reading of the whole of exh P2 the defendant cannot be held to account for the some. The learned author of Gatley, at p 88, put it this way:

> Although the judge does not have to be satisfied that the defamatory meaning contended for by the plaintiff is more probable than an alternative, innocent meaning, yet he should 'reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation', and 'it is not enough to say that by some person or another the words might be understood in a defamatory sense'. Mere conjectures which some person might possibly though unreasonably form are not enough to leave the case to the jury.

The court is satisfied that by the contents of the header, the defendant has in fact asserted that the information that appears below the header is not intended to mean any of the imputations that the plaintiff alleged. To borrow the words of his Lordship Justice Kinnear, in the House of Lords case of *Stubbs, Ld v Russel* [1913] AC 386 at p 392, '... what it is intended to represent is explained in a headnote, which must be read along with it in order to make it convey any intelligible meaning,' and when it is so read it is impossible that any reasonable man should collect from it the libelous imputation alleged.

In *Stubbs, Ld*, the plaintiff, a businessman, complained that the defendant had published the plaintiff's name in a weekly trade journal under a list of persons against whom judgment in default had been obtained in the small claims court. Just above the list, there appeared the following header:

> Extracts from the Court books of Decrees in Absence in the Small Debt Court. Note: — The following extracts from the court books have been received since our last issue, made up to the several dates given in the second column. It is probable that some of the decrees have been sisted, settled or paid; and in no case does publication of the decree imply inability to pay on the part of one named, or any things more than the fact that the entry published appeared in the court book ...

A In actual fact, the debt in question (in that case) had been settled and the action dismissed, no default judgment being recorded against the plaintiff. The plaintiff alleged that the entry of his name in the list, which he described as a 'Black List' falsely and maliciously represented that he was unable to pay his debts, he was insolvent and he was evading payment of a just debt. In the House of Lords, the plaintiff's claim was disallowed. It was B held by the House of Lords (at p 392):

> The alleged ground of action is an entry in what he describes as the defender's black list. But the entry is a mere statement of names, with a date and a sum of money; and what it is intended to represent is explained in the headnote, which must be read along with it in order to make it convey any intelligible C meaning.

At p 394, his Lordship Justice Kinnear concluded:

> I think it clear, in the first place, that the whole of the statement in the head-note, as I have quoted it, must be read in conjunction with the alleged excerpt from the Shariff's court books, and secondly, that when it is so read it is D impossible that any reasonable man should called from it the libelous imputation alleged.

Pursuant to s 3 of the Civil Law Act 1956, the principles of law and their application in *Stubbs, Ld* are not merely persuasive authority before the courts in Malaysia but represent our law. This was emphasized by Barakbah E CJ in *Abdul Rahman Talib v Seenivasagam & Anor* at p 72, as follows:

> By s 3 of the Civil Law Ordinance 1956, the Common Law of England is applicable in Malaysia except in so far as it has been modified by the Defamation Ordinance 1957.

More recently, in the case of *Pang Fes Yoon*, Suriyadi Halim Omar J, F reaffirmed the applicability of the English common law to the law of defamation in Malaysia, when he said:

> By virtue of s. 3 of the Civil Law Act 1956, the English common law which is the spring board of the local defamation law, has been statutorily imported keeping abreast with time, the Defamation Act 1957 (Act 286) was G promulgated, together with the necessary modification.

In our present Defamation Act 1957, there is no provision therein governing the principles upon which our courts are to construe the words complained of to determine if the same are capable of a defamatory meaning. In other words, in this area of the law of defamation, English H common law principles (as pronounced by the House of Lords in *Stubbs, Ld*) continue to apply and form part of the law in Malaysia.

In the light of the authorities referred to above, when the whole of exh P2 is reasonably construed, the only meaning that it can bear is that the information furnished to AOE relating to the plaintiff could only mean what was narrated therein, to wit, that a creditor's petition was presented against I the plaintiff on 30 October 1992 at the High Court of Kuala Lumpur at the instance of American Express (M) Sdn Bhd and notice of the some was advertised in *The Star* newspaper by way of substituted service. To find that

the meanings as alleged by the plaintiff are reasonably borne out, notwithstanding the header in exh P2 would, as concluded by his Lordship Justice Show at p 398 of *Stubbs, Ld,* permit a 'strained and sinister interpretation, which is thus essentially unjust'. What the report intended to represent is clearly explained in the header which must be read together with the report.

In short, all that the defendant was doing was to confirm that the information appeared in a particular source mention in the report, ie *The Star* newspaper dated 1 April 1993. The defendant was in effect saying:

> We confirm that a creditor's petition was presented against the plaintiff by American Express (M) Sdn Bhd. Notice of the some was advertised in *The Star* newspaper. We do not know the current status of the creditor's petition. If you wish to know the current status of the same you are advised to check with the relevant parties.

Therefore, the court is satisfied that the plaintiff has failed to establish that the contents of exh P2, which is the subject matter of the present action, are defamatory, eventhough on evidence, the plaintiff may have proved that those information or words therein refer to the plaintiff and that the words were published by the defendant. On this ground alone, the plaintiff's claim against the defendant can be dismissed with costs.

Tort of libel v tort of negligence

One pertinent point observed by the court in this action is that the plaintiff, in trying to establish his claims against the defendant has attempted to merge two separate and independent torts, to wit, the tort of libel with the tort of negligence, for an alleged loss of reputation. From the records available, the plaintiff had, at the eleventh hour, applied to amend his statement of claim to include an alternative claim in the tort of negligent misstatement. This application was however, dismissed. In the proposed amended statement of claim, the plaintiff alleged that the defendant was under a duty to the plaintiff to take care in furnishing information relating to its financial institution clients; that the defendant breached that duty in failing to update the information in its database relating to the plaintiff and in failing to include in the information so furnished a remark that the creditor's petition presented against the plaintiff had been struck out on 23 September 1993. Since the proposed amendment to the statement of claim was dismissed, it is not open to the plaintiff to advance his alternative claim of negligent misstatement and all of the matters raised in the proposed amendments. Yet, through his written submissions, the plaintiff has time and again advanced propositions, in support of his claim in libel, which propositions would only pertain in claim in tort of negligence or negligent misstatement (see paras 9.5 and 12.1 of the plaintiff's written submissions).

The plaintiff admitted the truth of the matters contained in exh P2 as a matter of historical account. What the plaintiff now purports to do is to move this court to find that the defendant was under a duty, imposed in the law of libel, if it chose to publish the matters contained in exh P2, to also publish the most up-to-date account as to the status of the bankruptcy

proceedings brought against the plaintiff. The plaintiff also asked that this court find that the defendant was under a duty, imposed in the law of libel, to make every effort to ascertain the most up-to-date account as to the status of the bankruptcy proceedings before it published the matters contained in exh P2, notwithstanding that the matters are factually correct. It also appears that the plaintiff proposes that this court hold that unless the defendant was able to publish the entire history of the bankruptcy proceedings brought against the plaintiff, the defendant was under a duty, imposed in the law of libel, not to publish the matters.

The court cannot agree with the plaintiff's propositions. The law of libel affords a remedy where a person is libeled by the publication of defamatory words. Damages for the omission to publish words, is not the domain of the tort of libel. It may well be that where such omission has occasioned loss to a party, that party may have his remedy in the tort of negligence, but as the law of libel caters for situation where words are published, a complaint of omission to publish, fundamentally, cannot found an action in libel. The law of defamation imposes a singular, paramount duty on the publisher — to speak to truth. In *Bell-Booth Group Ltd v Attorney General* [1989] 3 NZLR 148, the plaintiff presented a claim in libel and in the alternative, the tort of negligence in respect of a programme that was broadcasted on television. The claim in libel was dismissed as the trial judge found the words published during the broadcast to be true in substance and fact and the defence of justification was made out. The trial judge however found the first defendant liable in negligence as being in breach of a duty of care to first disclose to the plaintiff some of the matters prior to their being broadcasted, and the broadcast was therefore in breach of that duty. The first defendant appealed to the New Zealand Court of Appeal against the finding of liability in negligence in respect of the broadcast. The appeal was allowed. At p 156, his Lordship Cooke P stated:

> To an action in defamation, truth is an absolute defence... The important point for present purposes is that the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element... The duty in defamation may be described as a duty not to defame without justification or privilege or otherwise than by way of fair comment.

In another case, *Balfour v Attorney-General* [1991] 1 NZLR 519, the plaintiff, who brought an action in, inter alia, tort of negligence, sought damages for injury to his reputation, together with other heads of damages, arising from allegations of his homosexuality. His Lordship Harde Boys J, who sat in the New Zealand Court of Appeal stated:

> Any attempt to merge defamation and negligence is to be resisted. Both these branches of the law represent the result of much endeavour to reconcile competing interests in. way appropriate to the quite distinct areas to which they are concerned, but not necessarily appropriate to each other... An inability in a particular case to bring it within the criteria of a defamation suit is not to be made good by the formulation of a duty of care not to defame.

The above principle, was adopted by our courts. In *Uniphone Sdn Bhd v Chin Boon Lit & Anor* [1998] 6 MLJ 441, the High Court was confronted with a claim in negligence in respect of an article which was published in a newspaper which, as it turned out, was in substance and in fact, true. The plaintiff, in effect was claiming damages in negligence for the publication of words which were not false. It was held by the court (at p 446):

> It is my judgment that the tort of negligence ought not to restrict the freedom of speech, and restrain publishing statement which are true. It ought not to be the law that a person cannot make a statement which is true if it is foreseeable that the making of that statement could cause loss to a third party who admits to the truth of that statement.

The same principle was also adopted and followed by the High Court in *Kapt (B) Hj Mohd Ismail v Perwira Affin Bank Bhd (No 2)* [2001] 5 CLJ 184.

Based on those authorities, my conclusion on this point is that ingredients of the tort of negligence should not be allowed to be used to make true but defamatory statement actionable, particularly so, when, in the present case, the plaintiff's application to amend his statement of claim to include an alternative claim under the tort of negligence, has been dismissed by the court earlier.

Whether the words were in substance and fact, true

As has been stated earlier, the plaintiff in this action must first discharge the onus of proving that the words complained of were defamatory of the plaintiff. Only upon the plaintiff establishing this, does the burden then shift on the defendant to prove that those words were in substance and in fact true, if he wished to raise such defence (see *Abdul Rahman Talib v Seenivasagam* and *S Pakianathan v Jenni Ibrahim*). In the present case, the court has concluded that the words used in the report were not defamatory. Therefore in law, the defendant is not required to put up any defence to the plaintiff's claim. In any event, even assuming the plaintiff has successfully established that the words were defamatory, then the court shall now consider whether those words were in substance and fact, true.

In the present case, the plaintiff (PW1) in his evidence admitted that a bankruptcy proceeding was issued against him. He also confirmed that the documents at pp 48 and 49 of the bundle were the bankruptcy notice and creditor's petition presented against him (exhs P3A and P3B). An examination of the creditor's petition (exh P3A) discloses the followings:

(i) the creditor's petition was presented in the Kuala Lumpur High Court vide Bankruptcy No D5–29–5830–1992;

(ii) the creditor's petition was presented on 30 October 1992;

(iii) the plaintiff was named as respondent therein;

(iv) the plaintiff's NRIC number is stated as being 4695233;

(v) the plaintiff's address is stated as being No 7, Jalan 109, Kepong Baru, Kuala Lumpur;

(vi) the creditor's petition was presented by American Express (Malaysia) Sdn Bhd;

(vii) the creditor's petition was fixed to be heard on 4 May 1993; and

(viii) the solicitors acting for the petitioner was Messrs Isharidah, Ho, Chong & Menon.

A scrutiny of the advertisement of the notice of substituted service (exh D21) of the creditor's petition that appeared in *The Star* newspaper dated 1 April 1993 shows that the above details in the creditor's petition were also carried in the advertisement (exh D21). The contents of report (exh P2) have been narrated above. Not taking account of the header at the top of the page, exh P2 contains information identical with that in exhs P3A and D21, same and except for two-additional pieces of information ie the plaintiff's new NRIC number (541023106353) and the notation 'STAR 010493' which indicates that the source of the information as being *The Star* issue of 1 April 1993.

By the plaintiff's own testimony, the contents of exhs P3A and P3B are correct, ie American Express (Malaysia) Sdn Bhd had through their solicitors, Messrs Isharidah, Ho, Chong & Menon, on 30 October 1992 caused to be presented a creditor's petition against the plaintiff vide Kuala Lumpur High Court Bankruptcy No D5–29–5830–1992 which was fixed to be heard on 4 May 1993. This is all that was reported in exh P2. The court is satisfied that the contents of the report (exh P2) insofar as the same refer to the plaintiff and the creditor's petition presented against him, are factually correct.

As a matter of law, truth or justification, is an absolute defence to an action in libel or slander. If the statement is true no amount of malice or bad faith or belief in the falsity of the statement will make it actionable. If people think the worst of the plaintiff when they hear the truth about him, then his reputation has been reduced to the proper level (see *The Law of Defamation in Singapore and Malaysia* by Keith Econs (2nd Ed), p 49).

The above principle was followed and adopted in *Hasnul bin Abdul Hadi v Bulat bin Mohamed & Anor* [1978] 1 MLJ 75; and *Dato' Musa Hitam v SH Alattas & Ors* [1991] 1 CLJ 315.

In *Gatley on Libel & Slander* (9th Ed) at p 6, the learned author states the position of the law as follows:

> With one exception relating to spent criminal conviction, truth is a complete defence to an action for defamation in English law, even if the publication is made with a malicious desire to injure the plaintiff.

At p 233, the learned author stresses again that: 'it is not actionable maliciously to publish the truth.' As confirm by the learned author Keith Evans in *The Law of Defamation in Singapore and Malaysia* (2nd Ed) at p 49, the position of the law in Malaysia on this point is similar to that in England. Similarly in *Zolkefly bin Haron v Yahya bin Chik & Anor* [2001] 62 MLJ 1 the plaintiff sued in respect of alleged defamatory oral and written statements made by the defendants as regards the status of his banking

account. Jeffrey Tan J, having found that the statements were true and applying the above principle, dismissed the plaintiff's claim. I am also in full agreement with Kamalanathan Ratnam J in *Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr Mahathir bin Mohamad* [1999] 4 MLJ 58, when he said at p 69:

> It follow therefore that what is true, cannot be defamatory. This must be on grounds of public policy because the exposure of truth must be paramount when compared to that of reputation. Therefore, clearly these can be no room even for malice if the matter published is found to be true.

Therefore, in the present case, even assuming the words contained in the report (exh P2) are defamatory, the defendant by its own evidence as well as evidence of the plaintiff himself (PW1) has clearly shown that those words were in substance and fact, true. Based on the above authorities, the court is satisfied that truth is an absolute defence to an action for libel or slander. What is true cannot be defamatory. If truth can be defamatory, then people are scared to tell the truth in disclosing wrongdoings in the society. Public statements may contain distorting elements. Then falsity and hypocrisy will be the order of the day. The law will not allow that situation to happen beyond control. Therefore, the plaintiff's claim against the defendant must fail.

Publication of the information to Citibank and Hong Leong Finance Bhd

In his statement of claim (para 10), the plaintiff also alleged that the said report or information (as in exh P2) was also published to Citibank and Hong Leong Finance Bhd by the defendant. This is to support the plaintiff's claim for exemplary or aggravated damages. Unfortunately, the plaintiff did not lead any evidence, during trial, to support this allegation. The court finds that this aspect of the plaintiff's pleadings remained completely unproven and thus warrants no further consideration.

Conclusion

On the above considerations, the court holds that the plaintiff has failed to establish his claim against the defendant; and therefore the plaintiff's claim is dismissed with costs.

Plaintiff's claim dismissed.

Reported by Lim Lee Na